BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ASHLAND FIREFIGHTERS, LOCAL 875,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, CLC

and

CITY OF ASHLAND

Case 91
No. 70274
MA-14929

(Temporary Assignment Grievance)

Appearances:

Mr. Patrick Kilbane, 5th District Field Service Representative, International Association of Fire Fighters, 6847 East County Road "N", Milton, Wisconsin, appearing on behalf of Ashland Firefighters, Local 875, International Association of Firefighters, AFL-CIO, CLC.

Mr. Scott Clark, City Attorney, P.O. Box 389, 214 West Main Street, Ashland, Wisconsin, appearing on behalf of the City of Ashland.

ARBITRATION AWARD

International Association of Firefighters, Local 875, Ashland Firefighters, hereinafter "Union" and the City of Ashland, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was appointed. The hearing was held before the undersigned on May 19, 2011 in Ashland, Wisconsin. The hearing was not transcribed. The parties submitted briefs and reply briefs, the last of which was received on July 10, 2011, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

> Did the City of Ashland violate the collective bargaining agreement between IAFF Local 875 and the City when it unilaterally ended the long-standing practice of implementing temporary assignments and thereby reducing the wages of IAFF Local 875 members? Is so, what is the appropriate remedy?

The City frames the substantive issues as:

> Is it within the City's management rights to determine when "temporary Assignments" are assigned?

Having considered the evidence and arguments of the parties, I frame the substantive issues as:

> Did the City violate Article VI-Temporary Assignments of the collective bargaining agreement when it changed the manner in which it made temporary assignments? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE IV – WORK SCHEDULE

4.01 The basic work week for the following categories of employees shall consists of **a** fifty-six (56) hour average work week, to be worked in twenty-four (24) hour duty tours separated by twenty-four (24) hours off-duty in a twelve (12) day cycle.

The normal work day (0700-1600) and normal work week (Mon.-Fri.), for training and other regular routine duties shall be expanded to allow the Chief to assign bargaining unit members to training on Saturday mornings (0900-1200). The Chief retains

the discretion to assign the mechanic to vehicle repairs on Saturday mornings when such repairs are essential to the efficient operation of the fire department. Except as otherwise provided herein, holidays and periods outside the normal work day and work week shall be limited to response to emergency and non-emergency calls and items necessary thereto.

1. Assistant Chief
2. Captains
3. Lieutenants
4. Drivers and Ambulance Positions
5. Mechanic
6. Alarm Operators
7. Fire Fighters

4.02 Employees may exchange work days between themselves, subject to prior notification and approval of the (1) Chief, (2) Assistant Chief, or (3) Officer in Charge provided, however, the Employer shall not be liable for overtime which accrues, solely due to the exchange of work hours. The mechanic shall be permitted to exchange work days with drivers.

4.03 Employees who refuse callback shall forfeit that cycle and will not be eligible again until the cycle has been completed.

4.04 The work schedule shall be posted for one (1) month in advance. If changes in the posted schedule are necessary, all involved personnel must be notified as far in advance as possible, but in no event less than 24 hours in advance except in the case of sickness or emergency. Changes in station on the same shift do not require 24 hour notification.

. . .

ARTICLE VI – TEMPORARY ASSIGNMENTS

6.01 Temporary assignments to officer and driver positions shall go to the senior qualified on-duty personnel of the next lower classification in each station, except however, when such a vacancy will require calling in off-duty personnel.

Employees temporarily assigned to higher classifications for a period one (1) hour or more shall be paid at the rate required of that classification for the period of their assignment. In no case shall an employee's rate of pay be reduced by such an assignment.

. . .

ARTICLE XXII – POLICIES AND PROCEDURES MANUAL

22.01 The Comprehensive Policies and Procedures manual will apply to all members and officers of the Ashland Fire Department except in cases which may conflict with this contract.

EXHIBIT A

. . .

C. Temporary Assignment:
Previous month payable on the first pay day of each month.

. . .

BACKGROUND AND FACTS

The City operates a Fire Department which provides fire prevention and emergency medical treatment services to the public of the City of Ashland. The Department is staffed by 22 employees who are scheduled to 24 hour shifts. Seven bargaining unit employees are scheduled for each shift including one captain, one lieutenant, two driver/operators, two ambulance drivers and one fire/pipe, although seven employees may not work on a daily basis due to vacation time, sick leave and other approved leaves.

At all times relevant herein, the Fire Chief was Wayne Chenier. Chenier served as Interim Chief from January 1, 2006 until June 12, 2006 when he accepted the Chief position. Prior to accepting the Interim Chief position, Chenier was a member of the Union bargaining unit having served most recently with the rank of Captain.

The City and Union were parties to a collective bargaining agreement for the time period January 1, 2006 through December 31, 2008. The parties agreed to re-

open this contract and negotiated for an additional year. During negotiations, the parties modified Article VI – Temporary Assignments in that an employee would be paid on an hour for hour basis when they worked in a temporary assignment rather than the prior requirement of payment only after an employee performed the temporary assignment for 24 hours and created a Paid On-Call cadre of unrepresented employees. No other changes to the Temporary Assignment language were discussed. The record is silent as to when the Union ratified this extension, but the City executed the one year extension to the agreement on May 19, 2009.

On or about November 6, 2009, the City was preparing payroll and noticed that an employee who was on vacation was identified to receive temporary assignment compensation for November 3, 2009. The City investigated the situation and concluded that the employee was not entitled to temporary assignment monies and notified the Union. Union President Matt Herriott met with Chenier to discuss the situation and agreed that the employee was not entitled to the compensation. After meeting with Herriott, Chief Chenier issued the following letter on November 10, 2009:

> Dear Matt,
>
> First, I agree that Tim Ciembronowicz was entitled to upgrade on Friday, November 5, 2009 due to the fact he had already filled the role as the "Acting Lieutenant" prior to my decision not to pay the upgrade to Lt. Walters. I directed Captain Thimm to make the adjustment to payroll yesterday.
>
> The upgrade pay has nearly tripled over the past three years, and I have been directed by the City Administrator and the Finance Director to audit this line item to identify why. Although, I understand there are several factors that will affect this line item, such as; increase in wages, increased vacation time, work comp, sick leave, funeral leave and the way in which it is administered. The Administration and I are concerned by the way steep increases over the past three years, and since my appointment as Chief.
>
> I need to provide you with some history of how upgrade was approved in the past. First, Linda would produce the work schedule for the department each month, which was posted at the Captain's desk. Each morning, the OIC would adjust the assignments accordingly, if needed, by circling those individuals that were temporarily assigned for a 24 hour period. Linda would review those changes to the work schedule for

accuracy and submit the document to the finance department at the end of each month. However, I believe that once a hard copy of the work schedule was no longer produced, there was no longer a method of auditing who was being assigned into those temporary positions. I'm concerned there may be inconsistencies, by the Officers, in the way that the temporary assignments are being granted. The scenario that developed last Friday is a prime example. I'm not out to blame anyone, and I will take full responsibility for not setting a policy on this issue!

In addition, I was able to identify a major contributor for the steep increases to the upgrade pay over the past 3 years! Probationary or firefighters over 1 year of service are being placed into temporary ambulance driver assignments when staffing levels drop below seven personnel on any particular day. I believe that probationary or a firefighter over one year of service is entitled to upgrade when the shift is staffed at five personnel, no question! I will also state that assigning a lieutenant into a temporary captain's assignment is paramount. Temporarily assigning a driver to a lieutenant's position, in most instances, is acceptable.

From this day forth, I will allow the temporary assignment to Captain and Lieutenant to be filled. I will also allow the temporary assignment to an ambulance driver position to be filled by a probationary or firefighter over 1 year of service, permitting the shift is staffed at five personnel. However, I will no longer allow the lateral movement of an ambulance driver to fill a vacant driver (MPO) position when the shift is staffed at six (6). I will not authorize any staff member upgrade pay for filling a temporary assignment when they are off-duty during a trade day, vacation, sick leave, funeral leave….In addition, limited term employees will no longer be paid to fill temporary assignments. I will also be drafting a policy describing, in detail, when temporary assignments shall or shall not be filled in effort to bring consistency and conformity to this issue.

I appreciate your concerns and consideration and look forward to resolving this matter.

Respectively,

/s/
Chief Chenier

Chenier's letter prompted questions by the Union. Chenier met with Herriott on two occasions prior to the Union's filing of a grievance on December 1, 2009:

RE: Grievance for up-grade pay

Chief Chenier,

In accordance with our contract Ashland Firefighters Local 875 is filing a grievance in regards to your letter dated November 10, 2009 as well as the actions taken regarding said letter.

In regards to up-grade pay we contend the following:

1. Past Practice. Up-grade pay has been paid to all personnel moved to other positions for the past twenty plus years.

2. Agreement (contract) January 1, 2006 – December 31, 2009. In negotiations we agreed that hour for hour up-grade pay would stand as current and future practice.

3. The Ashland Fire Department is staffed at seven. This creates up-grade pay anytime staffing drops to six or less. We are staffed with a Captain, Lieutenant, two MPO's, two Ambulance Attendants and a Pipe man or other position. Anytime one personnel is gone this creates an open position.

4. We are seeking back pay for all affected personnel.

5. We insist that the current practice of up-grade pay as stated in the contract and prior to your letter be followed until resolution can be met.

Respectfully,

Matt Herriott
President Local 875

In response to the filing of the grievance, the City's Attorney responded not only denying the grievance, but also repudiating what it termed an "alleged past practice:"

Re: Grievance for Up-Grade Pay
Subject: Repudiation of Alleged Past Practiced

Dear President Herriott:

The purpose of this letter is to give notice to the International Association of Firefighters Local 875 of the City of Ashland's repudiation of the alleged past practice referenced in your December 1, 2009 grievance submitted to Chief Chenier. Any such alleged past practice is repudiated effective January 1, 2010, following the December 31, 2009 conclusion of the current collective bargaining agreement.

Article VI-Temporary Assignments under the contract requires an affirmative or express assignment to trigger the provision of Article 6.01. The express assignment is to come from the fire chief.

It is an inherent management right to make or not make a temporary assignment.

If you have any questions, please contact me.

Very truly yours,

/s/
Scott W. Clark
City Attorney

At the time that this grievance was filed, the parties were engaged in negotiations for the 2006-2009 successor labor agreement. Because of the ongoing negotiations, the parties agreed to waive the timelines for processing the grievance to allow for potential settlement during the negotiations. The parties reached a tentative agreement on February 17, 2011. The tentative agreement was ratified by the Union, but was rejected by the City Council. The tentative agreement contained language that settled this grievance and created new Article XI language.

On March 19, 2010 the City issued the following Temporary Assignment Policy:

PURPOSE

In this policy, the Ashland Fire Department establishes a standard method of temporarily assigning personnel to a higher classification.

PROCEDURE

1.0 Temporary Assignment to the position of Captain

1.1 The on-duty Lieutenant will fill the temporary assignment of Captain.

1.2 If the on-duty Lieutenant is not available, an off-duty Officer will be called in to fill the assignment.

1.3 All other shift members will remain in their respective assignments unless approved by the Chief or his designee.

2.0 Temporary Assignment to the position of Lieutenant

2.1 All other shift members will remain in their respective assignments unless approved by the Chief.

2.2 If the Chief decides to fill the absent Lieutenant's position, only qualified personnel shall be allowed to fill the assignment, and the qualifications shall be established by the Chief.

2.3 The Fire Chief shall determine whether or not an assignment will be made to fill an absent Lieutenant's position.

3.0 Probationary Employees filling Temporary Assignments

3.1 Probationary Firefighters shall be permitted to fill a temporary ambulance assignment with the shift is staffed at five (5) personnel.

3.2 A probationary employee will not be permitted to fill an assignment other than an ambulance position, unless approved by the Chief.

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

ARGUMENTS OF THE PARTIES

Union

The City violated the implied terms of the parties' collective bargaining agreement when it unilaterally terminated a binding past practice of paying bargaining unit members at the upgraded rate of pay when they were temporarily assigned to a higher classification.

The parties stipulated to the application of Article VI - Temporary Assignments of the labor agreement. Since at least 1979, the City automatically temporarily assigned employees to higher classifications. This is a practice has existed and has been consistently applied. The practice of making temporary assignments is as follows:

> When one of the full-time employees is off-duty for vacation, illness, funeral leave or other such reason, the person below him/her on that shift moves up into the position of off-duty employee. The next person below then fills his/her position and so on until there are no more employees to be upgraded into the next position above. If there is a

> higher rate of pay associated with the position to which an employee is upgraded, he/she receives that higher rate of pay.

The City's first error, and violation of the labor agreement, occurred when it unilaterally terminated this practice prior to the expiration of the collective bargaining agreement. The successor agreement to the 2006-2008 contract, as extended through 2009, was being negotiated. During those negotiations, the parties were discussing the Temporary Assignment language. The City was obligated to maintain the terms and conditions of the labor agreement during the contract hiatus.

The City's letter repudiating the Temporary Assignment practice was untimely. The letter was provided to the Union four months after Fire Chief Chenier had terminated the practice. The City had no right to terminate the binding past practice when the parties were actively involved in negotiating their successor agreement. Moreover, the City had no right to cut the wages of its employees in half. The City had a duty to bargain with the Union and it failed to do so.

Chief Chenier issued a policy addressing Temporary Assignments four months after the City stopped paying employees consistent with the labor agreement. That policy conflicts with the terms and conditions of the collective bargaining agreement. The City exceeded its management authority.

The Union respectfully requests that the Arbitrator order the City to reinstate the practice and make all Union employees whole.

City

The City maintains that the language of Article VI is clear and unambiguous and supports the City's position. Article VI addresses temporary assignments. The intention of the parties is clear. The language affirmatively granted the City the right to decide when and if a temporary assignment is to be made. The fact that the City never exercised its management right in this arena does not mean it has been relinquished. The arbitrator must enforce the clear language of the agreement even if the results are harsh.

The Union's claim that a binding past practice exists is false. The City never agreed to the automatic "domino assignments." The assignment process that was being used was the result of unilateral interpretation and implementation of the temporary assignment language by Union officers. This process was in direct contrast to the best interests of the City as evidenced by the burgeoning temporary assignment line item in

the fire Department budget. The City identified this ridiculous up-grade pay program and deemed that any "temporary assignments" must come from the Fire Chief.

The City repudiated the Union's '"domino assignment" practice. As the only non-Union employee in the entire department, the Fire Chief cannot be expected to be fully cognizant of everything. The City points to MONROE COUNTY, Case 137, No. 56304, MA-10223 (Greco, 8/98), wherein it was concluded that it is wrong to read into the contract an implied term which the parties have never agreed to.

The issuance of the Temporary Assignment Policy on April 2, 2010 was a legitimate exercise of management rights. Subsequent collective bargaining resulted in a tentative agreement which contained language modifying Article VI, but this was rejected by the Union. The City remains agreeable to that language.

The City maintains that the grievance is meritless and must be dismissed.

Union in Reply

The Union rebuts the arguments raised by the City.

The Union reiterates that it is not challenging the City's exercise of management rights. Rather, the Union asserts that the parties have negotiated language and have agreed to a past practice which limits management's rights. As a result, the City's unilateral changes violate the labor agreement.

The language of the agreement is not clear and unambiguous. If it was, then the questions that have arisen in this dispute would be answered – who makes temporary assignments; how does the language specify when a lieutenant moves to captain, when a driver moves to lieutenant, when a fire fighter moves to driver or ambulance attendant, and when a probationary fire fighter moves to driver or ambulance attendant; and when a vacancy requires calling in off-duty personnel? These questions are not answered by the language and therefore it needs further interpretation.

The City's claim that its actions were motivated by a directive to rein in upgrade pay is not a public policy decision. Not only does the Union question the validity of the City's historical upgrade pay documentation, but it also takes issue with the City's willingness to blame the Union officers for the upgrade pay problems.

The City's claim that the Fire Department Chief did not know of the 30 year practice is unbelievable. The Fire Chief approved payroll. The Chief was responsible

for managing his budget and was fully aware of the manner in which temporary assignments were made. In fact, the Fire Chief had been a captain in the Department before he was the Chief and therefore he made the temporary assignments.

The City violated the labor agreement and back pay is owed. The Union asks the grievance be awarded in favor of the union, the past practice reinstated and all affected members of the Union be made whole for lost wages.

City in Reply

The City maintains that the grievance is meritless.

Grounded in the basic inference that municipalities have "broad right of management in the assignment of duties and tasks," the City's decision to limit the number of temporary vacancies it fills is well within its management rights.

The Union is incorrect in its belief that the repudiation of the alleged past practice did not terminate the past practice on December 31, 2009. The Union appears to believe that the past practice continued on like contract term during contract hiatus which is incorrect. Rather, the City timely repudiated that practice and the parties negotiated, albeit unsuccessfully, new language. The failure to secure the benefit of the alleged past practice during negotiations and therefore the repudiation stands. MARSHFIELD ELECTRIC AND WATER DEPT., Case 159, No. 64228, MA-22845 (Mawhinney, 3/05) and CITY OF ASHLAND, Case 62, No. 48624, MA-7658 (Levitan, 7/93).

Finally, arbitrators have upheld the right of management to regulate and police an alleged past practice against abuse. The Fire Chief identified a problematic situation and ended the abuse and in doing so, the City fulfilled its obligation to the citizenry.

The grievance should be denied.

DISCUSSION

The Union and City do not agree as to the issue in this case. This is relevant because when both sides enter a dispute disagreeing as to the nature of the dispute, it makes the resolution process that much more difficult. It further denigrates the on-going relationship between the parties as was seen during the negotiations of the successor labor agreement.

The parties' disagreement relates as to the meaning of Article VI of the collective bargaining agreement. The City maintains that this language is clear and unambiguous and provides management the right to determine when a temporary vacancy exists and further, the right to determine if a vacancy shall be filled through a temporary assignment. The Union disagrees, maintaining that extrinsic evidence establishes the parties' intent.

This is a contract interpretation case. The parties' dispute arises out of the meaning of Article VI of their labor agreement. Contract interpretation is the ascertainment of meaning. Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p. 430 (2006). Language is clear when it is susceptible to one convincing interpretation, but may be deemed ambiguous if there is more than one plausible interpretation. Id. at 434. If the plain meaning of the language is clear, it is unnecessary to resort to extrinsic evidence. Id. Extrinsic evidence and rules of contract interpretation aid in ascertaining meaning and those relevant to this discussion include bargaining history and practices of the parties.

I start by pointing out that the City has not negotiated a management rights clause into the collective bargaining agreement. I accept the view expressed by Arbitrator Jonathan Dworkin in CLEVELAND NEWSPAPER PUBLISHERS ASSOCIATION, 51 LA 1174, 1181 (Dworkin, 1969) wherein he stated:

> It is axiomatic that an employer retains all managerial rights not expressly forbidden by statutory law in the absence of a collective bargaining agreement. When a collective bargaining agreement is entered into, these managerial rights are given up only to the extent evidenced in the agreement.

Decisions as to filling shifts relate to the operations of business and directing the work force and are inherent management rights. Therefore, unless this right to assign personnel to temporary shifts is otherwise limited, the City was entitled to take the action it took.

The parties specifically negotiated language addressing temporary assignments and it is contained in Article VI of the labor agreement. The language provides:

> 6.01 Temporary assignments to officer and driver positions shall go to the senior qualified on-duty personnel of the next lower classification in each station, except however, when such a vacancy will require calling in off-duty personnel.

> Employees temporarily assigned to higher classifications for a period one (1) hour or more shall be paid at the rate required of that classification for the period of their assignment. In no case shall an employee's rate of pay be reduced by such an assignment

The second sentence of Article VI is not in dispute. It establishes that the compensation for an employee who is assigned to work in another position temporarily will be paid on an hour for hour basis. I note that that this was new language, effective with ratification of the 2009 one-year labor agreement extension, and interestingly, at no time at hearing was there any testimony explaining how the City was determining when an employee is deemed to having been "working" in a temporary assignment and therefore entitled to compensation for the upgrade. Certainly the change from 24 hours to an hour for hour basis should have invoked an evaluation of not only the assignment process, but also the payment process. And, the change would likely have an impact on the total dollars spent for Temporary Assignments, but this issue is not ripe and I move on to the dispute at hand.

The first sentence of Article VI serves as the root of this dispute. It states that temporary assignments, "shall go to the senior qualified on-duty personnel…in the station." This is mandatory language. It directs which employees are entitled to the higher classification and limits the benefit to those already in pay status at the fire house. This language does not set forth what a temporary assignment is, when a temporary assignment is made, nor does it state what process shall be followed **to** fill a temporary assignment. As such, the language is ambiguous and subject to interpretation consistent with the principles of contract interpretation and extrinsic evidence.

Bargaining History

The bargaining history provides that this language has been in place since at least 1981, except for modification made to the second sentence addressing the payment in 2009. In 2009, the parties negotiated the hour for hour change. Prior to the contract extension, temporary assignment pay required that the employee work at least 24 hours in the higher classification in order to receive compensation. Union President Herriott testified that the Union agreed to the City's proposal for the creation of a Paid On-Call cadre of officers in exchange for its members receiving hour for hour payment for temporary assignments. Herriott testified that this topic was limited to any discussion between the parties regarding temporary assignments. The City did not offer any testimony on the bargaining history that either corroborated or refuted the Union witness' perspective. Ultimately, there is no evidence of any discussion or modification

to any other aspect the of temporary assignment language. The bargaining history does not assist me in determining the parties' intent as to the meaning of Article VI.

Past Practice

Arbitrator Jay Grenig described the circumstances of a past practice in NORTHCENTRAL TECHNICAL COLLEGE, WERC A/P M-01-18 (Grenig, 6/6/01) as:

> In order for a past practice to be binding on both parties, it must be equivocal, clearly enunciated and acted upon, easily ascertainable of a reasonable period over time, and consistently accepted by the parties as the required response over a reasonable period of time. The more times the conduct has been repeated without protest from the other party, the stronger the implication that the prior conduct represents a mutually accepted resolution of a particular problem and the greater the likelihood that the parties reasonably expect that such conduct will continue in the future. A past practice has a contractual significance only as a mutual response to a particular set of circumstances.

The Union maintains that a binding practice exists which sets forth the manner in which the parties have agreed, over greater than a 20 year time period, to make temporary assignments to cover an absence in a shift. The City stipulated at hearing that a binding past practice existed, but later argued in its brief that the practice was not known and/or agreed to by the City.

At hearing, the City stipulated that a past practice existed as to how temporary assignments were made. It was described at hearing as a process whereby if an employee that was scheduled to work was absent, then a "domino effect" of filling the vacant position occurred. More specifically, when the captain was absent, the lieutenant was temporarily assigned to the captain position which vacated the lieutenant position. When the lieutenant was absent or he/she was temporarily assigned to the captain position, then the most senior ambulance driver would be temporarily assigned to the lieutenant position, which vacated one of the ambulance/driver positions. When one of the ambulance/drivers were absent or when he/she **was** temporarily assigned to the lieutenant position, then the most senior firefighter would temporarily be assigned to the vacated ambulance driver position. Temporary assignments are made by the officer in charge in the fire house which was usually the captain who is a bargaining unit member. When employees are temporarily assigned to work in higher classifications, they are compensated at the higher rate of pay.

The City changed its position post hearing. In its brief, the City denied a past practice asserting that Fire Chief Chenier did not know how the officer in charge was filling absences on shifts nor did he agree, on behalf of the City, to the manner in which the temporary assignments were being made and therefore a binding past practice did not exist. The City's stipulation serves as evidence in this case, but assuming arguendo that the City did not stipulate to the past practice, I still do not find merit to either contention.

Chief Chenier has performed the fire chief functions since 2006, first as an interim appointment and then as the approved chief. Prior to accepting the interim position, Chenier held the position of captain in the department. In that role, Chenier was the officer in charge making the temporary assignments. Thus, Chenier was fully aware of the temporary assignment process after having made the assignments when he was a captain.

The record establishes that prior to 2005, the process utilized to make temporary assignments was for the officer in charge to work from a physical one-month calendar schedule. When an absence arose on a shift, the officer in charge would assign the position to the most senior employee in the next lower classification and circle that employee on the schedule to signify the temporary assigment. If this temporary assignment created a vacancy in the lower classification, the process would continue until all higher classification positions were filled. All circled employees would be paid at the higher classification rate. This process pre-dated Chenier's captain's incumbency and continued until 2005 when the Department implemented Fire House which is a computer software scheduling and payroll system. Fire House eliminated the physical circling process on the calendar and the ability to easily view what temporary assignments were made. The record is silent as to how temporary assignments are documented by the officer in charge, as well as, how an individual employee's payroll is modified to include the temporary assignment. But ultimately, Chernier approves payroll and therefore has the ability to monitor temporary assignments. The fact that he identified the November 3, 2009 situation establishes that he monitors payroll and temporary assignments.

Chenier was fully aware of the temporary assignment process and has approved payroll both before the fire house software and after the fire house that included temporary assignment upgrade pay. Chenier, and the fire chiefs that pre-dated him, acquiesced to the manner in which the temporary assignments were made.

As stated in OHIO EDISON COMPANY, 102 LA 717, 725 (1994):

> It is well settled, however, that the mere acquiescence to a particular practice or the failure of one of the parties to assert a right over a long period of time does not in and of itself establish a binding practice. A practice which develops as the result of mere happenstance or methods that developed without design or deliberation or because either party simply neglected to assert a right or authority does not become enforceable as an implied term of the agreement. Instead, before a practice can achieve that status, there must be persuasive evidence that the practice has become the "prescribed way of doing things" and that it is supported by mutual agreement.

The parties relied upon the described temporary assignment process to fill absences that occurred on scheduled shifts. This process provided the methodology of implementing the language of Article VI - Temporary Assignments. This methodology has been used for greater than 20 years and there is no evidence to indicate any deviation prior to the issuance of Chenier's letter of November 10, 2009. The parties therefore had a binding past practice.

Repudiation

Chenier's letter of November 10, 2009, informed the Union of certain limitations that he would impose on the parties' practice for making temporary assignments. These limitations were inconsistent with the parties' past practice. Chenier's letter amounted to an attempt to terminate a past practice during the term of the collective bargaining agreement. I find guidance in the writings of renowned Arbitrator Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements", 59 Mich. L. Rev. 1018, 1041 (1961):

> Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of that provision. As such, it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of the new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

The parties' past practice was a part of the labor agreement. Chenier's letter was an attempt by the City to unilaterally discontinue that practice. Not only did the City

create a different temporary assignment process, but it also discontinued compensating Union members who worked in temporary assignments.

Raye Edinger, a probationary employee, testified that there were occasions when he was working and the staffing level was at either five or six and he was assigned by either a lieutenant or captain to work in the higher classification ambulance position, but that he was not paid at the ambulance rate. Nathaniel Reisdorf, also a probationary employee, testified that he was consistently assigned to temporarily work in the higher classification ambulance position, both after November 10, 2009 and after January 1, 2010, and was not compensated consistent with the compensation language of Article VI. [1]

Chenier's letter of November 10, 2009 was issued during the lifetime of the 2006-2009 collective bargaining agreement. The City thereafter deviated from its past practice of making temporary assignments and compensating Union members for working in the higher classification temporary assignments. In doing so, the City exceeded its authority and violated the terms and conditions of the labor agreement.

On December 10, 2009, the City issued a letter to the Union which informed the Union that upon expiration of the current 2006-2009 collective bargaining agreement, it would no longer recognize the parties' practice of making temporary assignments. This letter was delivered during the term of the 2006-2009 collective bargaining agreement. This was a valid repudiation and thereafter, if the Union desired for the past practice that the parties used to make temporary assignments to continue, the onus was on it to negotiate the language into the successor collective bargaining agreement.

The parties did not have a successor labor agreement in place on January 1, 2010. Instead, they were involved in negotiations and they were actively involved in negotiating on various topics, including Article VI-Temporary Assignments. As a result, the parties were obligated consistent with the dynamic status quo doctrine which provides:

> that parties are entitled to retain those rights and privileges in existence when the old contract expired which are primarily related to wages, hours and conditions of employment." Id. at 22. Further, ''the dynamic status quo allows parties to exercise the rights which they have acquired

[1] There was testimony that employees performed the duties of an upgraded temporary assignment, but were neither formally assigned to the temporary position nor were compensated for the temporary assignment.

> through the collective bargaining process." Id. One of these rights is that "neither party has the obligation to bargain over matters addressed by that contract." Id. The reasoning behind this standard is that parties collectively bargain an agreement that should last until the successor agreement is reached. If one party comes to "regret" a condition of that agreement, the party must live with it until the parties successfully negotiate a new agreement or came to an impasse.

SUN PRAIRIE AREA SCH. DIST. VS. WISCONSIN EMPLOYMENT RELATIONS COMM'N, No. 2006CV3031 (Wis. Cir. Ct. Dane County, July 27, 2007) citing VILLAGE OF SAUKVILLE, DEC. NO. 28032-B at 21-22 (WERC 3/22/96).

As the City pointed out, there are significant monies involved in temporary assignments and therefore by repudiating the temporary assignment past practice, there was a reduction in employee compensation.[2] Those monies make the temporary assignment practice a topic which falls within the ambit of wages, hours, and conditions of employment and therefore a mandatory subject of collective bargaining. As such,

[2] The City Finance Department and the Fire Chief compiled data on Upgrade Pay from 1999 to 2011. That table provided as follows:

Year	Upgrade Pay
1999	$0
2000	$180
2001	$455
2002	$2,377
2003	$12,214
2004	$8,078
2005	$5,743
2006	$13,689
2007	$10,283
2008	$13,449
2009	$12,338
2010	$4,830
2011*	$1,449

*Upgrade pay issued for the first four months of 2011 (January 1st – April 31st.)

although the contract expired, the temporary assignment past practice provided for the administration of Article VI-Temporary Assignments and therefore the City was obligated to continue to comply with its terms until the successor agreement was reached. See ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93), aff'd, ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 Wis. 2D 671 (Ct. App. 1994). Because it failed to do so, the City violated the collective bargaining agreement.

This arbitrator recognizes that grievance arbitration and prohibited practice litigation have different standards of formality, law and precedence. Yet, the basic principles of fairness and equity remain the same. A party to a labor agreement is obligated to its terms and conditions until such time as the parties agree to make modifications. The City was well within its rights to timely inform the Union that it did not intend to continue the temporary assignment past practice. The December 10, 2009 letter did just that. But, when the parties have relied on a practice for greater than 20 years to administer an issue as important as temporary assignments, it is beyond the scope of the City's authority to unilaterally terminate the practice. The Union and City were involved in bargaining and the proper course of action would have been to repudiate the practice and then bargain the issue of how temporary assignments would be made, all the while complying with the terms of the past practice. I recognize that these parties did bargain and reach agreement on new temporary assignment language, only to have the City not ratify that language. That is exactly the reason that compliance with the terms of a binding past practice must be adhered to until they are either modified or abandoned.

The City argued that CITY OF ASHLAND, Case 62, No. 48624, MA-7658 (Levitan, 7/93) and MARSHFIELD ELECTRIC AND WATER DEPT., Case 159, No. 64228, MA-12845 (Mawhinney, 5/15/05) support the proposition that a binding past practice does not continue during a contract hiatus. Both of these cases are distinguishable. In CITY OF ASHLAND, *Id.*, Arbitrator Levitan concluded that the City had violated the labor agreement when it changed the manner in which sick leave benefits were calculated during a contract hiatus. And the issue of contract hiatus was not an issue in MARSHFIELD ELECTRIC AND WATER DEPT., *Id.* in that the parties completed bargaining and then the employer took action consistent with the newly negotiated language.

The City argues that this is a management rights issue and that it has the right to schedule employees. I concur that decisions relative to proper levels of staffing are management decisions, but the repudiation of the temporary assignment past practice was about the City's Up Grade pay line item and not staffing. The City did not change the number of staff assigned to any given shift by repudiating the past practice. Instead, it unilaterally changed what each employee would be paid.

The City takes issue with the payment of up-grade pay to probationary employees. While it is certainly understandable that City Council members may be concerned with paying probationary employees at an elevated hourly wage when they have not even secured regular employment status, the City has either not sought nor has it achieved such language at the bargaining table. Article IX - PROBATIONARY STATUS – NEW EMPLOYEES, it provides that "[p]robationary employees shall have all the benefits and conditions of work afforded to employees with seniority, except tenure and as otherwise expressly provided herein." Nowhere in Article VI is there any language which differentiates between employees with seniority and probationary employees, therefore the City exceeded its management rights when it created specifically denied probationary employees temporary assignment compensation.[3]

Finally, the City argues that the only remedy available is for the Arbitrator to order implementation of the tentative agreement reached by the parties. Article XI-Grievance Procedure, section 11.04 provides, "[t]he arbitrator shall neither add to, delete from, nor modify the express terms or conditions of the Agreement in either procedure contained herein." It is therefore beyond the scope of my authority to order implementation of the tentative agreement.

AWARD

1. The grievance is sustained in part and denied in part.

    a. The City violated Article VI-Temporary Assignments of the collective bargaining agreement when it repudiated the binding past practice as it related to the administration of the temporary assignments on November 10, 2009.

    b. The City did not violate the collective bargaining agreement when it repudiated the binding past practice as it related to the administration of the temporary assignments on December 10, 2009 effective January 1, 2010.

    c. The City violated Article VI –Temporary Assignments when it failed to continue the terms and conditions of the temporary assignment binding past practice during the

[3] The parties stipulated that the City paid upgrade pay consistent with Article VI-Temporary Assignments to probationary employees.

contract hiatus. The City is ordered to make the Grievants whole, retroactive to November 10, 2009, for the loss of temporary assignments, to be mutually agreed upon by the parties. In the event that the parties cannot agree, a hearing will be convened to address the issue of remedy.

d. I shall retain jurisdiction for 120 days to allow the parties to implement the terms of this Award.

Dated at Rhinelander, Wisconsin, this 7th day of October, 2011.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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